

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RESIDENTIAL CONSTRUCTORS, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 ACE PROPERTY AND CASUALTY)
 INSURANCE COMPANY,)
)
 Defendant.)

Case No. 2:05-cv-01318-BES-GWF

ORDER

This matter is before the Court on Defendant's Brief in Support of its Motion to Compel Production of Documents, to Stay Certain Discovery, and to Prohibit Interference with Non-Party Witnesses and Request for Sanctions (#24), filed April 20, 2006; Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Compel (#28), filed May 8, 2006; and Defendant's Reply Brief in Supports of its Motion to Compel (#34), filed May 26, 2006. The Court conducted a hearing in this matter on June 1, 2006.

DISCUSSION

This case involves issues of insurance coverage for property damage to Plaintiff's building construction project that occurred as an alleged result of rain or storm damage.

1. Production of Documents and Table of Contents or Index of Documents.

Defendant's Motion to Compel sought an order compelling Plaintiff to produce documents listed by it in its disclosures under Fed.R.Civ.Pro. 26(a)(1)(B) and in response to Defendant's Request for Production of Documents. Plaintiff responded that it took several months to gather the

1 voluminous documents and review them for privileged materials. Plaintiff completed that gathering and
2 its privilege documents review in April 2006 and the documents, which were contained in 41 large-
3 sized boxes, were made available for inspection by Defendant in late April 2006. By agreement of the
4 parties, in May 2006, the documents were digitally imaged and Plaintiff has provided Defendant with
5 CD discs containing the imaged documents which Plaintiff represents have been imaged in the same
6 order in which they are contained in the 41 boxes of paper documents. The imaged documents have
7 been numbered, apparently in continuous order from the first document imaged to the last document
8 imaged.

9 According to the Plaintiff, the documents are organized in the manner in which they were
10 maintained by Plaintiff and its contractors in the ordinary course of business. Plaintiff states that the
11 paper documents are maintained in various files with appropriate labels pertaining to the matters
12 contained in the files. Although Plaintiff gathered these documents together in 41 boxes, which have
13 now been imaged onto a computer, Plaintiff has not provided any table of contents or index of the
14 documents on the CDs. Defendant contends that without a table of contents or index, it is
15 unreasonably difficult to make use of the CDs. In addition, Defendant contends that a preliminary
16 review of the documents indicates that Plaintiff has produced substantial quantities of documents, such
17 as employee personnel records, which are irrelevant and which add to the difficulty and burden of
18 reviewing the documents and attempting to locate relevant materials. In response, Plaintiff argues that
19 the imaged documents are formatted so that Defendant can perform key word searches for information
20 in the documents, which it contends actually makes the documents more accessible than they would be
21 if produced in paper form with some type of limited table of contents or index.

22 Fed.R.Civ.Pro. 34(b) provides that a party who produces documents for inspection shall
23 produce them as they are kept in the usual course of business or shall organize and label them to
24 correspond to the categories in the request. Plaintiff contends that it has gathered together the
25 documents in the manner and order in which they are maintained in the usual course of business and
26 that it is not required by Rule 34(b) to organize and label them to correspond to the categories in
27 Defendant's request for production.

28 . . .

1 The Court disagrees that simply producing for inspection 41 boxes of documents, or producing
 2 documents in a computer imaged format, complies with Plaintiff's obligation under Rule 34. Although
 3 Plaintiff alleges that the documents are organized in the manner in which they kept in the usual course
 4 of business, Plaintiff has gathered these documents together from different entities and locations and
 5 has assembled the documents together in the boxes, which have now been imaged onto a computer
 6 data base. Clearly some form of table of contents or index of the materials produced should be
 7 provided. In circumstances involving a similar production of voluminous documents, the court in
 8 *Wagner v. Dryvit Systems, Inc.*, 208 F.R.D. 606 610-11 (D.Neb. 2001), stated:

9 Dryvit asserts that directing plaintiffs to find the discovery
 10 among volumes of irrelevant information complies with Federal Rules of
 11 Civil Procedure. To the contrary, producing large amounts of
 12 documents in no apparent order does not comply with a party's
 13 obligation under Rule 34. *Stiller v. Arnold*, 167 F.R.D. 68, 70-71
 14 (N.D.Ind.1996); *T.N. Taube Corp. v. Marine Midland Mort. Corp.*,
 15 136 F.R.D. 449, 456 (W.D.N.C.1991) The fact that a corporation has
 16 an unwieldy record keeping system which requires it to incur heavy
 17 expenditures of time and effort to produce requested documents is an
 18 insufficient reason to prevent disclosure of otherwise discoverable
 19 information. *Caruso v. Coleman Corp.*, 157 F.R.D. 344, 349
 20 (E.D.Pa.1994); *Baine v. General Motors Corp.*, 141 F.R.D. 328, 331
 21 (M.D.Ala.1991); *Snowden v. Connaught Laboratories, Inc.*, 137
 22 F.R.D. 325, 332-33 (D.Kan.1991); *Pollitt v. Mobay Chemical Corp.*,
 23 95 F.R.D. 101, 105 (S.D.Ohio 1982); *Baxter Travenol Labs. Inc. v.*
 24 *LeMay*, 93 F.R.D. 379, 383 (S.D.Ohio 1981); *Dunn v. Midwestern*
 25 *Indemnity*, 88 F.R.D. 191, 197-98 (S.D.Ohio 1980); *Kozlowski v.*
 26 *Sears, Roebuck*, 73 F.R.D. 73 (D.Mass.1976).

27 In *In re Aldelphia Communications Corp.*, 338 B.R. 546 (S.D.N.Y. 2005), the court further
 28 states:

29 The purpose behind the 1980 Amendment that added the "usual course
 30 of business" language to Rule 34(b) was to allow the discovering party
 31 access to business records in the manner documents were normally
 32 maintained by the producing party to prevent deliberate "shifting of the
 33 materials from the sequence which they were ordinarily kept to
 34 somewhere else..." 8A Charles Alan Wright & Arthur R. Miller, Federal
 35 Practice and Procedure § 2213. The solution proposed by the 1980
 36 Amendment was obviously intended to include all business forms, and as
 37 a logical extension documents stored as a matter of course or by official,
 38 i.e. corporate or governmental, directive would have to be included
 39 within the "usual course of business" rubric. The Court qualifies its
 40 ruling by explicitly stating that in order to satisfy the requirements of
 41 Rule 34(b) any archived documents produced must be thoroughly
 42 indexed, the boxes accurately labeled and the depository kept in good
 43 order. The Court does not endorse a method of document production

1 that merely gives the requesting party access to a “document dump,” *see*
 2 *Hagemeyer North America v. Gateway Data Sciences Corp.*, 222
 3 F.R.D. 594, 598 (E.D.Wis.2004), with an instruction to the party to “go
 4 fish,” *see Doe v. Nat'l Hemophilia Foundation*, 194 F.R.D. 516, 518
 5 (D.Md.2000).

6 The Court sees no legitimate reason why, in the course of assembling the documents together
 7 in the 41 boxes, Plaintiff did not or could not prepare a table of contents or index of what categories of
 8 documents were contained in different boxes, or groups of boxes or arranging to have such a table of
 9 contents or index prepared during the course of imaging the documents. Such a table of contents or
 10 index is reasonably necessary to determine, for example, from which entity or department the
 11 documents have been produced or the type of file in which they are contained. The Court, therefore,
 12 directs the Plaintiff to prepare and provide to Defendant a table of contents or index for the documents
 13 contained on CDs. In so doing, Plaintiff is not required to index each document in each file. Plaintiff,
 14 however, is required to identify the files it has produced and in which boxes or group of document
 15 numbers the files are located. Such table of contents or index shall be provided within thirty (30) days
 16 of the entry of this order.

17 **2. Exchange of Privilege Logs by Parties.**

18 Pursuant to the discussions with counsel for the parties at the June 1, 2006 hearing, it is further
 19 ordered that the parties shall exchange their privilege logs of allegedly privileged documents on or
 20 before June 9, 2006 at 5:00 p.m.

21 **3. Interference with Non-Party Witnesses or Individuals With Relevant**
 22 **Information.**

23 In its Motion, Defendant also sought an order that Plaintiff not advise or instruct non-party
 24 witnesses or persons with potentially relevant information not to informally speak with Defendant's
 25 representatives. Plaintiff denies that it has instructed any such persons not to speak with Defendant's
 26 representatives. The Court cannot conclude from the record before it that such instructions have been
 27 given to witnesses. Plaintiff is hereby directed, however, not to give such advice or instructions to
 28 non-party witnesses or individuals. The Court further states that the refusal of persons with potentially
 relevant information to interview with Defendant informally may provide valid grounds for deposing
 such persons, and if reasonable and necessary, the Court will increase the authorized number of

depositions to allow Defendant to obtain relevant information from non-party witnesses or persons who refuse to informally provide such information to Defendant.

4. Stay of Discovery and/or Extension of Discovery Cut-Off Date and Other Pre-Trial Deadlines.

The Court finds no basis to stay discovery at this time. Defendants are reasonably entitled, however, to additional time to depose Plaintiff's witnesses or employees in view of the delay in the production of Plaintiff's documents and the requirement that Plaintiff provide a table of contents or index of its document production within 30 days. In lieu of staying discovery, the Court hereby extends the discovery cut-off date and other pre-trial deadlines by ninety (90) days as follows:

1. Last day for expert disclosures: **October 6, 2006** (90 days from July 7, 2006)
2. Lay discovery cut-off date: **December 5, 2006** (90 days from September 5, 2006)
3. Last day to file dispositive motions: **January 4, 2007** (90 days from October 5, 2006)
4. Last day to file pretrial order: **February 5, 2006** (90 days from November 6, 2006).

In the event dispositive motions are filed, the date for filing the joint pretrial order shall be suspended until 30 days after a decision of the dispositive motions.

IT IS FURTHER ORDERED the disclosures required by Fed. R. Civ. P. 26(a)(3), and any objections thereto, shall be included in the pretrial order.

5. Award of Fees and Costs or Other Sanctions.

The Court will not award either party attorney's fees or costs or impose other sanctions relating to the matters raised in the Motion. It appears to the Court that some delay in production of Plaintiff's documents was unavoidable in view of the voluminous nature of the documents in issue. There was a lack of adequate communication on both sides that could have perhaps expedited the production of documents or resolved the dispute regarding the manner in which the production took place. Further delay or failure to provide a table of contents or index of the documents in accordance with this Order, however, may result in an award of fees, costs or other sanctions. Defendant's motion to disqualify Plaintiff's counsel is denied. Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Compel Production of Documents, to Stay Certain Discovery, and to Prohibit Interference with Non-Party Witnesses and Request for

1 Sanctions (#24) is GRANTED, in part, and DENIED, in part, in accordance with the foregoing
2 provisions of this Order.

3 DATED this 5th day of June, 2006.

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6 GEORGE FOLEY, JR.
7 U.S. MAGISTRATE JUDGE
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